8/25/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Everwood Treatment Co., Inc. and Cary W. Thigpen,	)	**Docket No. RCRA-IV-92-15-R**
	)	
	)	
Respondents	)	

ORDER DENYING MOTION TO AMEND COMPLAINT

The substance of the initial complaint and compliance order (complaint), issued on June 16, 1992, against Respondents (collectively Everwood) in this proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6928) was set forth in a prior order and will not be repeated here.[1/]

Under date of June 17, 1993, Complainant filed a motion for leave to amend the complaint, a motion for leave to amend pre-hearing exchange and a memorandum in support thereof (motion). The motion stated that Complainant desired to amend the complaint to include material facts regarding a substantial release of a copper, chromate, arsenate solution (CCA) which allegedly occurred at the Everwood facility in early July 1990 when a mixing tank ruptured. This incident allegedly occurred prior to the spill referred to in the initial complaint which resulted when a pipe carrying CCA burst or split. An investigation and issuance of the initial complaint

---

[1/] Order Denying Motion To Strike Or In The Alternative Motion For Partial Summary Judgment, February 25, 1993. The motion to strike sought the deletion of references to Alabama law and counts of the complaint based thereon.

resulted from an anonymous tip that two truckloads of CCA contaminated soil and debris had been buried at the Everwood plant site.

The CCA spill, estimated at 10,000 gallons, occasioned by the rupture of the mixing tank, was allegedly much larger than that resulting from bursting of the pipe. CCA-contaminated soil was allegedly buried in a pit located in the southwest corner of the Everwood facility, the same location where contaminated soil resulting from the pipe spill was subsequently buried. Facts concerning this tank rupture and alleged burial of CCA-contaminated soil are assertedly based on an interview with a former employee of Everwood[2/] and a sampling investigation of the plant site and adjoining property, conducted during the period January 5 - 7, 1993, which allegedly revealed elevated levels of copper, chromium and arsenic when compared to background levels.[3/] According to Complainant, these facts were not known by either Complainant or ADEM at the time the initial complaint was filed. Therefore, Complainant states that it wishes to amend the complaint to allege EPCRA and CERCLA violations resulting from the non-reported

---

[2/] Complainant's memorandum of law in support of the motion to amend states that this interview occurred in December 1992.

[3/] EPA's RCRA Case Development Investigation (March 1993), reporting the January inspection, states that elevated levels of chromium, copper and arsenic relative to background concentrations were found in Samples S2 and S4, but that TCLP and EP toxicity tests showed that extracts from these samples were below regulatory limits (Id. at 4, 7). Copper was detected in Groundwater (GW) Sample 4 at a concentration of 40 ug/l (ppb).

releases occasioned by the tank rupture. Additionally, Complainant says that it determined, subsequent to filing of the initial complaint, that the amount of arsenic released, referred to therein, exceeded the reportable quantity and that, therefore, it is moving to amend the complaint to add a CERCLA Section 103 count based on the release occasioned by the pipe break. Complainant proposed to correct several typographical errors in the initial complaint, to correct an error in the RCRA penalty calculation and to increase the penalty sought from $497,500 to $659,375.

In the accompanying memorandum in support of its motion to amend (supra note 2), Complainant recites the general rule that where there is good cause for an amendment and the Respondent will not be unduly prejudiced, motions to amend administrative pleadings should be freely granted, citing Yaffe Iron & Metal Co., Inc. v. U.S. EPA, 774 F.2d 1008, 1013 (10th Cir. 1985); In the Matter of San Antonio Shoe, Inc., EPCRA Docket No. VI-501-S (April 2, 1992); and Rule 15(a), FRCP.[4/] Complainant argues that the amendment is necessary to include material facts which were not known at the time the initial complaint was issued. The interview with the former Everwood employee, assertedly in the course of preparation for hearing, did not occur until December of 1992 and the results of the January 1993 sampling, which allegedly confirmed information obtained from the former employee, were not available until March of 1993. Complainant says that it immediately informed Everwood's

---

[4/] ". . . leave [to amend] shall be freely given when justice so requires."

counsel of its intention to move to amend the complaint.[5/] For all of these reasons, Complainant urges that its motion for leave to amend the complaint and its pre-hearing exchange be granted.

Everwood's Opposition

On June 28, 1993, Everwood served its Opposition to Complainant's motion to amend and a memorandum in support thereof, alleging, inter alia, that no factual basis exists to support the grant of the motion to amend, that the underlying circumstances relied upon to support the amendment were illusory, that Complainant's attempt to amend the complaint was tantamount to bad faith, undue delay, or dilatory motive and will result in extreme prejudice to Respondents. Accordingly, Everwood argues that the motion for leave to amend be denied.

Reciting the history of this case, Everwood states that it began three years ago with the receipt by ADEM on August 23, 1990, of an anonymous tip that on one occasion Everwood had buried soil contaminated with a spill of CCA solution at its Irvington, Alabama plant. This tip resulted in an inspection of Everwood's plant by ADEM on September 21, 1990, notification of EPA by ADEM and a request for sampling assistance (ADEM letter, dated September 28,

---

[5/] Complainant states that Everwood's counsel was informed that EPA had learned of another larger spill at the Everwood plant and that counsel and the ALJ were informed of the intention to amend the complaint to include these facts and EPCRA and CERCLA claims during a conference call on March 22, 1993. During this call, this matter was scheduled for hearing in Mobile on August 10, 1993.

1990). On February 13, 1991, a joint ADEM-EPA inspection of Everwood's plant was conducted wherein the alleged burial or disposal site was excavated. Analyses of samples from the excavation using the Toxicity Characteristic Leaching Procedure (TCLP), 40 CFR Part 261, Appendix II, revealed chromium in excess of the limit (5.0 mg/l) specified in section 261.24 in leachate Sample Nos. 3 and 4 and in soil Sample Nos. 5 through 9. Additionally, soil Sample No. 5 showed lead in excess of the regulatory limit (5.0 mg/l) and soil Sample Nos. 8 and 9 showed arsenic in excess of that limit (5.0 mg/l). Chromium was also shown to be above the regulatory limit in soil Sample Nos. 5 through 9 using the Extraction Procedure (EP).[6/]

On August 5, 1991, ADEM issued a proposed order to Everwood which included a penalty of $50,000 for alleged violations of Alabama's Hazardous Waste Minimization Act, the State counterpart of RCRA. By Order No. 92-029-HW, dated January 9, 1992, the proposed order was implemented. Everwood appealed this order to the Alabama Environmental Management Commission. By Order No. 92-127-WW, dated June 17, 1992, Order No. 92-029-HW was revoked, upon the ground it was unnecessary to duplicate EPA enforcement of RCRA. Everwood regards the instant action as a continuation of the ADEM proceeding and emphasizes that ADEM's June 17 order recognizes that the violations alleged in EPA's initial complaint are the same as

---

[6/] The EP test was deleted from Appendix II of Part 261, effective September 25, 1990. See 55 Fed. Reg. 11863, March 29, 1990, and 55 Fed. Reg. 26987, June 29, 1990.

those alleged in ADEM's Order 92-029-HW, which was based upon a single spill. Everwood also emphasizes that Table 5 of the March 1993 investigation report, showing groundwater analyses results, omits any reference to chromium and arsenic.[7/] Everwood cites these results to bolster its argument that the alleged "new facts" upon which the motion to amend is based simply do not exist.

Everwood asserts that it has expended a massive amount of time in preparation for the trial of this case and, citing decisions to the effect that substantive amendments to the complaint offered just before trial are not to be countenanced, e.g., Feldman v. Allegheny International, Inc., 850 F.2d 1217 (7th Cir. 1988), argues that the same result should apply here. Everwood also cites Foman v. Davis, 371 U.S. 178 (1962), wherein the court set forth five factors for consideration in deciding motions to amend: (1) bad faith, (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether plaintiff has previously amended its complaint. Everwood says that a finding of the existence of any one of these factors is sufficient to justify denial of the motion. Everwood points out that Yaffe Iron & Metal Co., supra, is distinguishable, because that case involved a motion to amend to conform to the evidence and was decided under FRCP Rule

---

[7/] Table 5 shows groundwater results, metals and extractable organic analyses, which are apparently used only to determine the presence of hazardous constituents (Part 261, Appendix III). In accordance with § 261.24(a), however, only methods listed in Appendix II (or equivalent methods approved by the Administrator) may be used to determine whether a solid waste exceeds toxicity limits.

15(b) (Opposition at 8). It asserts that San Antonio Shoe, supra, is not controlling, because that case did not involve a motion to amend six weeks prior to trial and that facts supporting the amendment were not known and could not have been known at the time the complaint was originally filed.[8/]

Everwood contends that the motion to amend should be denied on the basis of bad faith, dilatory motives, confusion, abuse and gamesmanship (Opposition at 8). "Bad faith," which Everwood alleges has permeated these proceedings from their inception, is based in part on EPA's efforts to turn the entire seven-acre-parcel occupied by Everwood into a hazardous waste disposal facility, whereas the actual disposal unit was assertedly only six feet in diameter and approximately three to four feet deep. Everwood also asserts, without reasons or supporting authority, that ADEM and EPA are bound by the same penalty calculation matrix, yet EPA is seeking a penalty of almost $500,000 based on the same violations for which ADEM sought $50,000. Additionally, Everwood points out that neither ADEM nor EPA allowed prompt excavation and disposal of the alleged hazardous waste, but instead directed Everwood to take no action, allegedly for the purpose of justifying an outrageous

---

[8/] Complainant has filed a reply to Everwood's opposition, alleging, inter alia, that it is hard to imagine how an unreported spill of over 10,000 gallons of CCA solution and subsequent concealment of contaminated waste do not constitute "new facts." The EAB has indicated, however, that absent an advance motion for leave to file, replies to responses to motions, not being provided for in the rules, will normally be struck. Hardin County, Ohio, RCRA (3008) Appeal No. 92-11 (Order Denying Reconsideration, February 4, 1993).

penalty by increasing the number of days of alleged violation (Opposition at 9, 10).

Everwood asserts that EPA's actions in this case demonstrate its propensity for gamesmanship, alleging that the January 1993 inspection was a belated attempt to justify the penalty claimed. According to Everwood, the Agency's latest survey demonstrates that there has been no environmental impact on the property and that faced with this fact, the Agency has chosen to assert new and different theories of liability knowing that there is no basis therefor and that the proposed amended complaint will serve no other purpose but to complicate and confuse an otherwise uncomplicated case.

Everwood argues that the amendment should be denied because of undue delay, stating that it is undisputed that the Agency waited for three months after receiving the March 1993 report before filing its motion to amend. Everwood cites cases, e.g., Feldman v. Allegheny International, Inc., supra and Amcast Industrial Corporation v. Detrex Corporation, 132 F.R.D. 213 (N.D. Ind. 1990), for the proposition that a presumption against amendment grows with delay and the proximity to trial.

D I S C U S S I O N

The general rule is that amendments to pleadings will be liberally granted where the ends of justice will be thereby served and no prejudice to the opposing party results. See 3 Moore's Federal Practice, ¶ 15.08 and Foman v. Davis, supra. This is

especially true in administrative proceedings, as the EAB has stated that "[it] adheres to the generally accepted principle that 'administrative pleadings' are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted." In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992), slip opinion at 41. Port of Oakland involved a motion to amend made at the conclusion of the hearing, allegedly to conform to the proof. The EAB upheld denial of the motion upon the ground that additional counts in the proposed amended complaint were not proven.

There is no doubt that a finding that the amendment was sought for some ulterior purpose or to gain some tactical advantage or to abuse or harass would justify denial of the motion. See, e.g., GSS Properties, Inc. v. Kendale Shopping Center, 119 F.R.D. 379 (M.D.N.C. 1988) (three-month delay in moving to amend characterized as "blatant" where the court found plaintiff's claim it did know facts upon which proposed amendment was based prior to instituting the action was false). It is unnecessary, however, to adopt or endorse Everwood's extravagant assertions of bad faith and gamesmanship in order to deny Complainant's motion in this instance,[9/] because it is well settled that belated claims which

---

[9/] Without deciding the issue, the Agency's position that the entire parcel on which the Everwood treatment plant is located must be regarded as a hazardous waste facility may be justified by the definition in 40 CFR § 260.10 providing:

(continued...)

change the nature of litigation are not favored. In accordance with this rule, amendments to pleadings offered on the eve of trial which would substantially expand the scope of the trial or alter the nature of defenses have been rejected. See, e.g., In the Matter of Briggs & Stratton Corporation, TSCA Docket No. V-C-001-002-003 (Initial Decision, June 17, 1980) (amendment to complaint offered less than 20 days prior to trial rejected) and Evans v. Syracuse City School District, 704 F.2d 44 (2nd Cir. 1983) (granting amendment to answer, filed six days prior to the trial, which raised for first time res judicata, held to be an abuse of discretion). See also Deasy v. Hill, 833 F.2d 38, 43 (4th Cir. 1987) (motion to amend made immediately before trial and three months after facts upon which motion was based became available to plaintiff, denied for undue delay); and Campbell v. Ingersoll Milling Machine Co., 893 F.2d 925 (7th Cir. 1990) (denial of motion to amend to add new legal theories made three weeks prior to trial, not an abuse of discretion).

Here, Complainant says that the delay in moving to amend after the RCRA Case Development Investigation report became available was

---

[9/](...continued)

> Facility means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

Moreover, if evidence of a second (first in time) spill obtained from a former Everwood employee is credited, Complainant's January 1993 investigation of the site may not be dismissed as a "fishing expedition."

occasioned by a review instituted to determine compliance with the Paperwork Reduction Act (44 U.S.C. §§ 3501 et seq.). While this may explain the delay from Complainant's prospective, the necessity for this review may not be laid at Everwood's doorstep. It is concluded that disposition of the motion is a matter committed to the sound discretion of the ALJ and under all of the circumstances, including the fact that this matter has been pending for over a year, that Everwood has been operating under the cloud of a very large penalty, that this matter was scheduled for hearing by notice, dated March 22, 1993, and that granting the motion would require an indefinite continuance of the hearing in order to allow Everwood to file an answer and to defend against the expanded allegations, the motion to amend will be denied.

O R D E R

Complainant's motions to amend the complaint and to amend its pre-hearing exchange are denied.

Dated this 28th day of July 1993.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION TO AMEND COMPLAINT**, dated July 28, 1993, in re: Everwood Treatment Co., Inc. and Cary W. Thigpen, Dkt. No. RCRA-IV-92-15-R, was mailed to the Regional Hearing Clerk, Reg. IV, and a copy was mailed to Respondents and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: July 28, 1993

ADDRESSEES:

John V. Lee, Esq.
166 Government St., Suite 202
Mobile, AL 36602

Kathleen V. Duffield, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Ms. Julia P. Mooney
Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365